BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANCISCO ACUNA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,003,788
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY and ESIS/FIDELITY & GUARANTY INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant and respondent and its insurance carrier Liberty Mutual Insurance Company appeal the March 23, 2005 Award of Administrative Law Judge Pamela J. Fuller. Claimant was awarded benefits for a 51 percent permanent partial general work disability under K.S.A. 44-510e for injuries suffered through April 30, 2002. The Appeals Board heard oral argument on June 22, 2005.

APPEARANCES

Claimant appeared by his attorney, C. Albert Herdoiza of Kansas City, Kansas. Respondent and its insurance carrier Liberty Mutual Insurance Company (Liberty Mutual) appeared by their attorney, Terry J. Malone of Dodge City, Kansas. Respondent and its insurance carrier ESIS/Fidelity & Guaranty Insurance Company (Fidelity & Guaranty) appeared by their attorney, Shirla R. McQueen of Liberal, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). This includes the Stipulation signed by the parties and marked as Exhibit A to the submission letter of respondent and its insurance carrier Fidelity & Guaranty.

ISSUES

1. What is the nature and extent of claimant's injury? More particularly, what task loss did claimant suffer pursuant to K.S.A. 44-510e? Additionally, did claimant put forth a good faith effort to obtain employment as is required by K.S.A. 44-510e after being released from his employment with respondent?

2. What is the appropriate date of accident?

3. Is Liberty Mutual entitled to a reimbursement from Fidelity & Guaranty of $3,001.38 for benefits paid to claimant during the litigation of this matter?

4. Is respondent entitled to a credit pursuant to K.S.A. 44-501(c) for a preexisting condition?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

The Award sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own, so long as they do not contradict the findings and conclusions contained herein.

Claimant, a meat packer, had been working for respondent in that capacity since November of 1999. Before that time, claimant worked at other occupations with respondent. By April 22, 2002, claimant was experiencing difficulties with both hands. He informed his supervisor that he was having difficulties and that his job was violating his restrictions from an earlier work-related injury suffered in 1993. Claimant also had complaints to his shoulders, neck, back and chest. On April 30, 2002, claimant was moved to a light-duty position, working on the Paint and Clean-up Crew. While claimant transferred to different positions with respondent after that, he never returned to his regular duties, but instead moved to other light-duty positions. Claimant's employment with respondent continued through August 29, 2003, at which time respondent determined that it could no longer accommodate claimant's restrictions and claimant was placed on leave of absence. Claimant has not returned to his employment with respondent since that date.

A dispute exists between the two insurance companies who provided workers compensation insurance coverage to respondent during this litigation. Liberty Mutual provided workers compensation insurance coverage for the period September 1, 2001, through August 31, 2002. Fidelity & Guaranty began providing workers compensation insurance coverage on September 1, 2002, and continues from that day forward.

Understandably, Liberty Mutual contends that claimant's date of accident extends beyond its August 31, 2002 coverage date through claimant's August 29, 2003 last day worked. Fidelity & Guaranty contends, however, that claimant's date of accident should be the April 30, 2002 date when claimant was released to light-duty to the Paint and Clean-up Crew. After April 30, 2002, claimant continued on light duty, working bagging finger trim and returning to the paint crew and ultimately stamping angus through his last day worked. Based upon the testimony and evidence in this record, none of these light-duty jobs aggravated claimant's condition.

When dealing with date-of-accident determinations in microtrauma cases, Kansas has a lengthy history of appellate decisions. Beginning with *Berry*[1] and continuing through *Kimbrough*,[2] the determination of a date of accident in microtrauma cases has been difficult. The appellate courts have attempted to establish a bright line rule for identifying the appropriate date of accident in a repetitive, microtrauma situation. The ultimate determination is that the date of injury, if appropriate, will be the last day worked.[3]

In *Lott-Edwards*, *Anderson* and *Berry*, the claimants were all forced to terminate their employments due to the injuries sustained by microtraumas. In those cases, the bright line rule is clearly applied.[4]

However, in *Treaster* and *Durham*, the claimants did not terminate their employments, but accepted accommodated positions that were significantly different than those which caused the claimants' microtrauma injuries. Nevertheless, the courts continued to apply the *Berry* rule, determining that the last day worked is the claimant's last day on the job that caused the injuries.[5] *Treaster* specifically approved *Berry*, *Durham* and *Anderson*, stating:

> We do not limit *Berry* to only situations where the claimant could no longer continue his or her employment because of medical conditions. The expected result of *Berry* was for workers to be allowed the latest possible date for their claim period to begin,

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[1] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[2] *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

[3] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000); *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 960 P.2d 768 (1998); *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997).

[4] *Kimbrough* at 855.

[5] *Treaster* at 624; *Durham* at 335-336.

> not for claimants and respondents to try to pick a date of accident or occurrence that best serves their financial purposes.[6]

Respondent and its insurance carrier Liberty Mutual argue that *Kimbrough* applies in this instance, as claimant continued working for respondent through August 29, 2003. However, *Kimbrough* is distinguishable based upon these facts. In *Kimbrough*, the claimant continued working at the employment position which caused her injuries through the last day worked prior to the regular hearing. In *Kimbrough*, the claimant was not assigned to a light-duty or accommodated position, but instead continued performing the same duties which caused her injuries. In this case, the facts are more tantamount to that found in *Treaster*, where the claimant continued working for the respondent, but in a light-duty position that did not cause continued injury to claimant's body. As noted in *Treaster*, the date of accident then becomes the last day worked on the job that caused the injuries.

In this instance, that date is April 30, 2002, the day claimant was transferred to the Paint and Clean-up Crew. The Board, therefore, finds that the ALJ's determination that claimant suffered accidental injury through April 30, 2002, should be affirmed.

This, therefore, determines adversely to Liberty Mutual its claim that it is entitled to $3,001.38 reimbursement. As the date of accident fell within its coverage, Liberty Mutual would not be entitled to reimbursement for the monies paid.

K.S.A. 44-510e(a) defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[7]

Claimant was determined by both Edward J. Prostic, M.D., and C. Reiff Brown, M.D., to have a 17 percent impairment to the body as a whole. Dr. Brown, however, opined that claimant had a 6 percent impairment to the left upper extremity which preexisted claimant's April 30, 2002 date of accident. However, Dr. Brown's opinion was

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[6] *Treaster* at 623.

[7] K.S.A. 44-510e(a).

pursuant to the third edition of the AMA *Guides.*[8] K.S.A. 44-510e, in effect on April 30, 2002, mandates that the functional impairment opinion be pursuant to the fourth edition of the AMA *Guides*.[9] The ALJ determined that the evidence was insufficient to support respondent's contention that it was entitled to a credit under K.S.A. 44-501(c) which allows an award to be reduced by the amount of functional impairment determined to be preexisting. The Board finds, as did the ALJ, the evidence in this case to be insufficient to support respondent's contention that it is entitled to a credit under K.S.A. 44-501(c), as the only preexisting impairment opinion, that being Dr. Brown's, is in violation of K.S.A. 44-510e with regard to which version of the AMA *Guides* was utilized. The Board, therefore, affirms the ALJ's denial of a preexisting impairment credit to respondent.

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[10]

But that statute must be read in light of both *Foulk*[11] and *Copeland.*[12] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. Here, claimant did accept respondent's offer of accommodation and continued working in an accommodated job through August 29, 2003, when respondent could no longer provide accommodated work. At that time, respondent released claimant, being unable to further accommodate him. The Board finds that the policies contained in *Foulk* do not apply to this circumstance.

In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based

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[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3rd ed.).

[9] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[10] K.S.A. 44-510e.

[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[13]

In this case, claimant continued seeking employment after applying for unemployment through the end of February 2004, as verified by claimant's list of the places he looked for employment.[14] Claimant qualified for unemployment, making the appropriate weekly applications. The Board finds that claimant's activities during this period of time constitute a good faith effort on his part to obtain employment. Therefore, through February 29, 2004, the Board finds the policies contained in *Copeland* do not apply. As claimant was unemployed for the period August 30, 2003, through February 29, 2004, the Board finds claimant has a 100 percent wage loss during that time.

After February 29, 2004, while claimant contends he continued to seek employment, he provided little or no evidence in the record of that ongoing job search. Claimant testified to three to four employment searches per week, but was unable to provide specific information as to the location of these job searches or to verify that he completed any applications. Additionally, claimant testified to seeking employment in the oil fields, which would be contrary to the restrictions placed upon him both by Dr. Brown and by Dr. Prostic. The Board finds after February 29, 2004, claimant has failed to show that he put forth a good faith effort to obtain employment. Pursuant to *Copeland*, the Board will, therefore, impute to claimant a post-injury wage showing the capacity of claimant to earn wages.

Claimant was interviewed by vocational experts Michael J. Dreiling and Terry L. Cordray. Mr. Cordray determined claimant had the capacity to earn between $6 and $6.50 per hour, which, when compared to his average weekly wage of $450.36, computes to a 42 to 47 percent wage loss. Mr. Dreiling determined that claimant had suffered a 48 percent loss in his ability to earn wages. The Board, in considering the opinions of both Mr. Cordray and Mr. Dreiling, determined that claimant has suffered a 44 percent wage loss for the period beginning March 1, 2004.

The ALJ in the Award found claimant to have suffered a 44 percent wage loss, but made no determination regarding claimant's disability for the period from April 30, 2002, through August 29, 2003, when claimant continued working on light duty, or for the period

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[13] *Id*. at 320.

[14] R.H. Trans., Cl. Ex. 2..

August 30, 2003, through February 29, 2004. The Board amends the Award of the ALJ, finding claimant to have been entitled to a functional impairment only during the period claimant continued working for respondent on light duty at a comparable wage through August 29, 2003. From August 30, 2003, through February 29, 2004, claimant has suffered a wage loss of 100 percent. As of March 1, 2004, claimant's wage loss is 44 percent.

K.S.A. 44-510e requires that a determination be made regarding what, if any, loss of task performing abilities claimant has suffered.

Again, the opinions of Mr. Cordray and Mr. Dreiling are utilized. Dr. Prostic, in considering the opinion of Mr. Dreiling, found claimant incapable to performing seven of ten previous tasks, for a 70 percent task loss. Dr. Prostic, in considering the task list of Mr. Cordray, found claimant incapable of performing six of twelve previous tasks, for a 50 percent task loss. Dr. Brown, in considering the task list of Mr. Dreiling, also found claimant incapable of performing seven of ten tasks, for a 70 percent task loss. Dr. Brown, in considering the task list of Mr. Cordray, found claimant incapable of performing five of twelve previous tasks, for a 42 percent task loss. The Board, in considering the opinions of the two doctors and their review of the task lists prepared by the two vocational experts, finds no justifiable reason to place greater emphasis on the opinion of any expressed by the doctors in this record. The Board will, therefore, average the opinions, finding claimant to have suffered a 58 percent task loss pursuant to K.S.A. 44-510e. This task loss is identical to that determined by the ALJ, and the Board affirms that finding.

The Board, therefore, finds claimant entitled to a 17 percent functional impairment to the body as a whole through August 29, 2003. K.S.A. 44-510e requires that the wage and task loss opinions be averaged. As of August 30, 2003, claimant has a 100 percent wage loss and a 58 percent task loss, for a 79 percent permanent partial general work disability. As of March 1, 2004, claimant has suffered a 44 percent wage loss and a 58 percent task loss, for a permanent partial general disability of 51 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 23, 2005, should be, and is hereby, modified, and claimant is awarded benefits for injuries suffered through April 30, 2002, while employed with respondent, and based upon an average weekly wage of $450.36. Claimant is entitled to 69.57 weeks of permanent partial general disability compensation at the rate of $300.26 per week totaling $20,889.09, for the period April 30, 2002, through August 29, 2003, for a 17 percent permanent partial impairment on a functional basis. Thereafter, claimant is entitled to 26.29 weeks of permanent partial general disability compensation at the rate of $300.26 per week totaling $7,893.84, for the

period August 30, 2003, through February 29, 2004, for a 79 percent permanent partial general disability. Thereinafter, as of March 1, 2004, claimant is entitled to 115.79 weeks of permanent partial general disability compensation at the rate of $300.26 per week totaling $34,767.11 for a 51 percent permanent partial general disability, for a total award of $63,550.04.[15]

As of September 15, 2005, claimant is entitled to 176.43 weeks permanent partial general disability compensation at the rate of $300.26 per week, for a total due and owing of $52,974.87, which is ordered paid in one lump sum, minus any amounts previously paid.

Thereafter, the remaining balance of $10,525.17 shall be paid at the rate of $300.26 per week for 35.05 weeks, until fully paid or until further order of the Director.

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of September, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Terry J. Malone, Attorney for Respondent and its Insurance Carrier (Liberty Mutual)
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier (Fidelity & Guaranty)
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[15] The Board's award computation, while incorporating different wage loss percentages for different times than the ALJ is her award, nevertheless reaches the same final result for a total award.